

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 09-50026 (REG)

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5 In the Matter of:

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7 MOTORS LIQUIDATION COMPANY, et al.,

8 f/k/a General Motors Corp., et al.

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10 Debtors.

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14 U.S. Bankruptcy Court

15 One Bowling Green

16 New York, New York

17

18 April 23, 2012

19 9:00 AM

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21 B E F O R E :

22 HON ROBERT E. GERBER

23 U.S. BANKRUPTCY JUDGE

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1 Hearing re: Doc# 10048, Debtors' Objection to Proof of
2 Claim #45631, filed by Steven Newman, c/o Michael Green,
3 Deceased

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25 Transcribed by: William Joshua Garling

1 A P P E A R A N C E S :

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7 BY: JOSEPH H. SMOLINSKY, ESQ. (TELEPHONIC)

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9 LAW OFFICES OF BENJAMIN M. DEL VENTO, P.C.

10 Attorney for Opposition

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12 BY: MAURICE J. DONOVAN, ESQ. (TELEPHONIC)

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14 ALSO PRESENT, DANIEL GRIFFITHS

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P R O C E E D I N G S

THE COURT: Good morning. This is Robert Gerber.

May I get appearances on the record, please.

MR. DONOVAN: Good morning, Your Honor.

Maurice (indiscernible).

MR. SMOLINSKY: Good morning, Your Honor.

(Indiscernible.)

THE COURT: You guys were either talking over yourselves or otherwise inaudible. I couldn't hear.

MR. DONOVAN: Good morning, Your Honor.

Maurice J. Donovan, the Law Office of Benjamin Del Vento, appearing on behalf of the opposition.

THE COURT: Okay.

MR. SMOLINSKY: Good morning, Your Honor.

Joseph Smolinsky from Weil, Gotshal & Manges, for the reorganized debtors, and I also have Daniel Griffiths on the line.

THE COURT: Okay. All right.

Gentlemen, I have an interlocutory decision on this matter, which I will now dictate into the record.

In this contested matter in the jointly administered Chapter 11 cases of Motors Liquidation Company, the debtors, I have before me the claim of Steven Newman on behalf of the estate of decedent, Michael Green, the Guck Trust (ph). On behalf of the unsecured creditors of old GM,

1 under old GM's now confirmed reorganization plan, objects to
2 his claim on the ground that it seeks punitive damages and
3 that allowance of such a claim would be inequitable as it
4 would not punish the wrongdoer, the former GM, and instead,
5 would punish old GM's innocent creditors.

6 Mr. Newman disputes that his claim is for punitive
7 damages and further disputes the Guck Trust contention that
8 allowance of the claim would be inequitable. He says that,
9 and I'm quoting "The distinction which must be drawn is that
10 the most substantial element of damages in the Newman action
11 is not a punitive damage claim...this claim is not a
12 punitive damages -- damage, singular -- claim, it is a claim
13 for a compensatory damages. Because it is not a punitive
14 damage claim, the authority cited by the debtor in support
15 of the disallowance of damages derived from an award of
16 punitive damage, is not applicable (sic). Newman responds
17 paragraph 16 "Not" an original. Newman does not dispute
18 that to the extent his claim is for punitive damages. It
19 cannot be allowed, but he characterizes his claim as a claim
20 for compensatory damages.

21 I am skeptical of that, but before I can make
22 factual findings as to its nature (which may be deemed to be
23 mixed questions of fact and law) and whether 100 percent of
24 it is for punitive damages, I will give Mr. Newman the
25 Evidentiary Hearing he requested -- on the issue that is

1 properly before me, which is the extent to which the damages
2 he seeks are compensatory or punitive. That will be
3 significant because I'm further ruling -- now as an
4 interlocutory matter and as the predicate for the final
5 order after I determine the extent to which the remaining
6 claim is for anything other than punitive damages -- that to
7 the extent the claim is for punitive damages, it must at the
8 least be equitably subordinated if not also disallowed.

9 The bases for this decision -- to be fleshed out
10 further to the extent necessary after the Evidentiary
11 Hearing -- follow. As facts I find that Michael Green, the
12 decedent, was seriously injured in a car accident involving
13 a T-top Chevrolet Camaro in 1986. Thereafter, counsel for
14 Mr. Green brought suit against General Motors in New Jersey
15 State Court. In this first suit, the jury could not reach a
16 verdict. The case was tried again and Mr. Green was awarded
17 over 17 million in compensatory damages. This verdict
18 resulted in a \$22 million dollar payment to Mr. Green and
19 his lawyers in 1999, which included interest on the
20 judgment. The payment of \$22 million reflected a projected
21 life expectancy to the age of 77, but sadly, Mr. Green
22 passed away in 2001 at the age of 31.

23 After Mr. Green's death, Mr. Newman became the
24 representative of Mr. Green's estate. Mr. Newman brought a
25 second claim on behalf of Mr. Green's estate, this time in

1 the U.S. District Court for the District of New Jersey
2 alleging that GM had wrongfully failed to produce documents
3 that GM should have produced -- and that if GM had produced
4 those documents in the first lawsuit, then Mr. Green would
5 have been able to seek punitive damages in the first
6 lawsuit. These documents were discovered after a disclosure
7 in a similar, but unrelated personal injury suit. In that
8 second suit, that is the one in the Federal Court in New
9 Jersey, Mr. Newman sought damages for spoliation of evidence
10 and statutory treble damages under the New Jersey RICO law.
11 Mr. Newman alleges that at least the majority of damages
12 sought in the second suit are compensatory in nature, while
13 the debtors argue that they are, in reality, punitive.

14 This second New Jersey lawsuit, for additional
15 damages is the basis for Mr. Newman's claim in the debtor's
16 Chapter 11 case, Claim No. 45631. Although originally filed
17 in an unliquidated amount, Mr. Newman has since agreed to
18 cap the claim at \$75 million pursuant to the alternative
19 dispute resolution procedures in place for this case. I
20 further find as facts, or as mixed questions of fact and
21 law, that the damages in the first lawsuit were compensatory
22 and that to the extent compensatory damages were owing as a
23 consequence of the injury to Mr. Green, his estate was
24 already compensated by the \$22 million dollar award in the
25 first action, which was fully paid.

1 It appears before me on the record so far that
2 whether denominated as for "spoliation" as a "RICO
3 violation" or as for any other kinds of sanctions, the
4 claims in this second action by reason of the underlying
5 claim (that if the documents had not been wrongfully
6 withheld, they would have supported a claim for punitive
7 damages), their predicate (i.e. that there are species of
8 sanctions for wrongful conduct in the first action), their
9 purpose (principally), for punishment (and because the Green
10 estate already got a full compensatory damages award -- are
11 predominately, if not totally, for punitive damages. But I
12 think I should allow Mr. Newman to put on any evidence he
13 might have to cause me to come to a different view and, if
14 he can, to put on any other evidence tending to show that
15 his claims have a compensatory damages component of which
16 I'm now unaware.

17 The Green estate was already fully compensated for
18 the damages flowing from his injury and death. It is
19 entitled to put on proof of any other injury and suffering,
20 for which true compensatory damages are due. But to the
21 extent it cannot show any losses for anything other than
22 punishment (or let's not to put on evidence of such) I'll
23 have to find its claim is, as it now appears to be, for
24 punitive damages alone.

25 Moving on now to my conclusions of law. The Guck

1 Trust seems to assume for the purposes of this objection and
2 in any event, I do, that former GM failed to disclose
3 evidence that the former GM should have disclosed and that
4 such might have supported a claim for punitive damages in
5 the first lawsuit. The Guck Trust contends that any failure
6 was not intentional (a matter that I can't, but don't need
7 to decide now), but the Guck Trust does not challenge the
8 possibility that intentionally withholding such evidence
9 might justify punitive damages (or the equivalent) under New
10 Jersey law.

11 Instead, the Guck Trust seeks disallowance of the
12 Newman claim because of the gross unfairness to all GM's
13 creditors that would result from the allowance of a claim of
14 up to \$75 million dollars, which is in the nature of
15 punishment for the former GM's acts, when that company is no
16 longer in business, is liquidating, and the punishment of
17 innocent creditors would do no good.

18 As noted above, Newman disputes those contentions
19 by saying in substance that they are irrelevant. His claims
20 are for compensatory damages, not punitive ones. As I'll
21 discuss in a moment, those points are not at all irrelevant.
22 They are critical. But preliminarily, however, I need to
23 address a procedural matter. Mr. Newman's claim, that
24 "(t)his Court should not retain jurisdiction and should
25 submit the claim for trial to liquidate the claim and then

1 return it to the Bankruptcy Court."

2 Response paragraph 23: I cannot agree with such a
3 contention. Here, that would be manifestly inappropriate.
4 Determining the allowance or disallowance of claims is one
5 of the traditional functions of the Bankruptcy Court.
6 Determining the allowance of claims and their priority is
7 the paradigmatic example of the Bankruptcy Court's exercise
8 of its in rem jurisdiction. By filing a claim here,
9 Mr. Newman submitted himself to the jurisdiction of the
10 Bankruptcy Court, and deciding claims matters in the
11 Bankruptcy Court is the norm.

12 Of course, bankruptcy judges occasionally decide
13 that it might be better to liquidate a claim through a trial
14 in another court and then to bring the result back to the
15 Bankruptcy Court to proceed to a determination of whether
16 the judgment should be allowed or disallowed under federal
17 bankruptcy law.

18 We do that when the alternative court has special
19 expertise that it might bring to the table and where that is
20 more efficient, and most importantly, where it matters, but
21 such action is neither necessary or appropriate here.

22 I assume for the purpose of this analysis that a
23 former GM intentionally (or perhaps unintentionally)
24 withheld evidence in the first case, and had never gone into
25 bankruptcy, the former GM could be punished for that and

1 that the punishment could be substantial. But the issue
2 here in the Bankruptcy Court is whether Motors Liquidations'
3 innocent creditors should be the ones paying the price. No
4 useful service would be served -- excuse me -- no useful
5 purpose would be served by liquidating the claim elsewhere
6 because the issue in this court will remain. The decision
7 here will not turn on how great the punishment for any
8 wrongful discovery violations otherwise would be. It will
9 be whether given the liquidation of old GM, its cessation of
10 business and the unfairness to innocent creditors, damages
11 to the extent they're punitive -- whether for a farthing or
12 \$75 million dollars -- should be allowable pari passu with
13 the claims of other creditors including other accident
14 victims who have not yet been paid more than a modest
15 percentage of their compensatory damages claims. This
16 claim, like claims generally, will be heard and decided in
17 this court.

18 Then we get to the merits. It's undisputed here
19 that to the extent the claim is for punitive damages as
20 contrasted to compensatory ones, it is subject to
21 disallowance or subordination, so I need only give this
22 issue a brief mention.

23 Even though section 510(c) of the code expressly
24 authorizes only equitable subordination, equitable
25 disallowance is as permissible as equitable subordination

1 is, though it is imposed less commonly.

2 The seminal case in this area, Pepper V Litton,
3 was, in fact, an equitable disallowance case. In each of
4 the three courts that have considered the permissibility of
5 equitable disallowance have found it to be permissible in
6 appropriate cases.

7 One was a decision authored by me in an adversary
8 proceeding in Adelphia, 365B.R.24 at pages 70 to 73.

9 Another was a decision by Judge Lawrence McKenna
10 of the District Court in this District affirming me as to
11 this issue in Adelphia with his own additional analysis
12 C390B.R.64 at pages 74 to 76.

13 And the third was by Judge Mary Walwrath in
14 Washington Mutual, 461 B.R.200 at 257.

15 As Judge Walwrath put it, and I'm quoting, Here
16 the Court agrees with the well-reasoned decisions of the
17 Bankruptcy Court and District Courts in Adelphia and
18 concludes that it does have the authority to disallow a
19 claim on equitable grounds "in those extreme instances --
20 perhaps very rare -- where it is necessary as a remedy." Id
21 at 257 (quoting from my decision in Adelphia 365 B.R. at
22 73).

23 I note that although it may not appear if you
24 shepherdize Judge Walwrath's Washington Mutual decision the
25 traditional way, she later vacated her decision when parties

1 made a deal in the case.

2 Nevertheless, that reflects thinking on this exact
3 issue by a very respected Judge and frankly I have my
4 reservations as to the extent to which judicial thinking
5 could be vacated and made irrelevant by the decision of
6 parties to make a deal after the decision was issued at
7 least on matters of law as compared and contrasted to
8 disputed issues of fact.

9 But this case is not one of those rare cases where
10 disallowance would be absolutely necessary to grant
11 effective relief because old GM's estate is hopelessly
12 insolvent and there won't be a distribution to equity
13 anyway. Equitable subordination as contrasted to equitable
14 allowance might well meet the needs and concerns of Motors
15 Liquidations' creditors. But, in fact, with old GM
16 liquidating and no longer continuing in business, one could
17 make a respectable argument that no useful purpose would be
18 served even by punishing old GM's equity holders since
19 nearly all of them were innocent public stockholders who
20 shouldn't be punished any more than an innocent creditors
21 should. But whether the defense is denominated as
22 "equitable disallowance," "disallowance" for other reasons
23 (such as there here being nobody to punish) or even supports
24 only equitable subordination, we effectively get to the same
25 result -- the result that Mr. Newman acknowledged that his

1 claim is allowable as a pari passu claim only to the extent
2 that it is for compensatory damages and not for punitive
3 ones.

4 Although Mr. Newman's claim in the New Jersey suit
5 might have some compensatory damages component (of which I'm
6 now unaware, though I think he should be able to show me
7 proof of such if there is any), on the state of the record
8 now, the requested damages are, in substance, either wholly
9 or very nearly wholly punitive.

10 Mr. Green received \$22 million dollars in 1999
11 following two trials. This award reflected a jury's
12 determination of the amount necessary to compensate him for
13 his injuries and to care for him for the remainder of his
14 life. In fact, this award compensated Mr. Green for an
15 anticipated life span 46 years longer than his actual
16 lifetime, which nobody is asking Mr. Green's estate to
17 return.

18 Additional damages above this amount cannot make
19 Mr. Green or his estate more whole. They can only serve to
20 punish old GM innocent creditors. The unfairness of this
21 has been recognized at the Circuit Court of Appeals level.
22 See Novak v Callahan, C-A-L-L-A-H-A-N (in re GAC Corp.), 681
23 F.2nd 1295, 1301 (11th Circuit 1982) ("[T]he effect of
24 allowing a punitive damages claim would be to force innocent
25 creditors to pay for the bankrupt's wrong doing. Such a

1 result would be inequitable....").

2 And the Supreme Court has held that "since the
3 power of disallowance of claims, conferred by the Bankruptcy
4 Court by [Section 2 of the then existent Bankruptcy Act]
5 embraces...the rejection of claims' in whole or in part,
6 according to the equities of the case, 'the Court may
7 undoubtedly require limitation of the amount of claims in
8 view of equitable considerations."

9 Manufacturers Trust Company v Becker, B-E-C-K-E-R,
10 338 U.S. 304, 310 note 7 (1949), quoting Pepper v Litton.

11 Punitive damages are particularly inappropriate in
12 instances where, as in the Motors Liquidation case, the
13 debtor is liquidating, as there would be no deterrent
14 purpose or effect.

15 I'm going to give Mr. Newman the Evidentiary
16 Hearing he requested to give him one more chance to show
17 that some part of this present claim in this second suit is
18 for compensatory damages, and even that the lion's share of
19 the damages now claimed is for compensatory damages, though
20 it now appears that all or nearly all of it is for what I
21 must find to be punitive damages. I'll give him an
22 Evidentiary Hearing for that purpose, and for that purpose
23 alone, I should say, for the avoidance of doubt, unless he
24 and the Guck Trust can agree upon the amount, in any, to
25 which what is now being sought is compensatory in nature.

1 At such time as the amount of his compensatory
2 damages claim, if any, is fixed, and the punitive damages
3 component is fixed, I'll enter a judgment allowing the
4 compensatory damages component and subordinating the
5 punitive damages component to the claims of other old GM
6 creditors, or, if it turns out that there's some reason for
7 doing so, disallowing it altogether.

8 Gentlemen, this is an interlocutory decision. I'm
9 going to so order the record, unless either side wants a
10 written order, the two of you should work out mechanisms for
11 Mr. Newman presenting to the Guck Trust side what his
12 contentions are for any component of his damages that might
13 really be compensatory and trying to reach agreement on that
14 if you can.

15 If you can't, or if you agree to disagree, then
16 Mr. Newman can have an Evidentiary Hearing on this.

17 On this date of the record, I see a little, if
18 anything, that would be owing from Motors Liquidation to the
19 Newman estate side by way of discovery that could be
20 relevant, but if the Guck Trust side does want to take
21 discovery of the Newman side as by example it might if it
22 didn't trust any invoices or anything like that, it should
23 have the right to do so. Although I'll say now for
24 avoidance of doubt that I'm not prejudging any discovery
25 disputes as against the possibility that I might not have

1 thought of something so far.

2 I would encourage you folks, both sides, this is
3 not by way of ruling, but advice, that unless there is some
4 facts that have not been brought to my attention, what we
5 have left is going to be found to be wholly for punitive
6 damages. Nevertheless, I would encourage you to go to the
7 ADR mechanism to see if you can resolve it. Failing that,
8 you'll have the right to your Evidentiary Hearing, if you
9 choose to have it, and I will also say that if, based on the
10 undisputed facts, the Newman side wants to rest on the
11 showing that it took so far, and to take my ruling up on
12 appeal, and waive the right to the Evidentiary Hearing, it
13 can discuss that with the Guck Trust and notify the Court
14 after which I will more fully flesh out the bases for this
15 decision if it ever turns out to be necessary.

16 But at this juncture, I am willing to hear more
17 facts. And both sides will have the right to present such
18 additional facts as they regard as appropriate at an
19 appropriate time.

20 Not by way of reargument, are there any open
21 issues?

22 Mr. Smolinsky, first from you.

23 MR. SMOLINSKY: Nothing, Your Honor.

24 Thank you.

25 THE COURT: Mr. Donovan?

1 MR. DONOVAN: (Indiscernible) Your Honor.

2 THE COURT: All right. Very well.

3 Have a good day, gentlemen.

4 We're adjourned.

5 MR. SMOLINSKY: Thank you.

6 MR. DONOVAN: Thank you.

7 (Whereupon these proceedings were concluded at 9:36 AM)

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C E R T I F I C A T I O N

I, William J. Garling certified that the foregoing
transcript is a true and accurate record of the proceedings.

William
Garling

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Date: April 29th, 2012